INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
1. The Statutory background	3
2. The transactions involved	6
3. The proceedings below	9
Argument	11
Conclusion	14
Appendix	15

CITATIONS

Cases:

Land O'Lakes Creameries, Inc. v. *Commodity Credit Corporation*, 265 F. 2d 163	12
Swift & Co. v. *United States*, 257 F. 2d 787, certiorari denied, 358 U.S. 837, rehearing denied, 358 U.S. 901	11, 12

Statutes:

Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U.S.C. 1281, *et seq.*:	
7 U.S.C. 1302 (1946 ed.)	3
7 U.S.C. 1303	3
Agricultural Act of 1948, 62 Stat. 1247	4
Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*:	
7 U.S.C. 1421(a)	15
7 U.S.C. 1421(b)	5, 15
7 U.S.C. 1426	15
7 U.S.C. 1429	5, 15
7 U.S.C. 1446(c)	5, 16
7 U.S.C. 1447	16

Statutes—Continued

Page

Steagall Amendment, 55 Stat. 498, 15 U.S.C. 713a-8 3
28 U.S.C. 1404(a) 10

Miscellaneous:

Executive Order 9250, dated October 3, 1942, 7 F.R. 7871 3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 247

KRAFT FOODS COMPANY OF WISCONSIN, ET AL., PETITIONERS

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin (App. 985-1013)[1] is reported at 164 F. Supp. 168. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 28-45) is reported at 266 F. 2d 254.

[1] "App." refers to Petitioners' Appendix in the court below.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1959 (Pet. 46-47). The petition for certiorari was filed on July 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under the Agricultural Act of 1949, the Secretary of Agriculture's power to support the prices of whole milk, butterfat, and their products is limited to making "loans on, or purchases of" such commodities. On March 9, 1954, the Secretary announced that the level of support would be reduced on April 1 from 90% to 75% of parity, and he authorized the Commodity Credit Corporation to accept combination offers of manufacturers and handlers to "sell" butter and cheese to Commodity at one price and "rebuy" them from Commodity at a lower price, resulting, in each case, in a direct payment by the Government to the offerers of the difference between the two prices.

The question is whether these transactions exceeded the Secretary's power under the statute to support prices by "purchases."

STATUTE INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

1. *The Statutory Background*

For an understanding of the transactions involved, a brief statement of the statutory background is desirable.

Government price supports on agricultural commodities began prior to World War II. Various methods of price support as to different commodities have been authorized by Congress and employed by the Department of Agriculture under different statutes. Thus, under the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, 7 U.S.C. 1281, *et seq.*), the Secretary of Agriculture was authorized "to make *payments* to producers * * * [of basic crops]" (7 U.S.C. 1303, emphasis added) and "to make available *loans* on agricultural commodities (including dairy products)" (7 U.S.C. 1302 (1946 ed.), emphasis added). The so-called Steagall Amendment to that statute (which was passed in 1941, 55 Stat. 498) broadened the authority of the Secretary by permitting the use of a "commodity loan, purchase, *or other operation*" if necessary to encourage production during the war emergency (15 U.S.C. 713a-8, emphasis added).

By a later war measure (Executive Order 9250, dated October 3, 1942, 7 F. R. 7871), the Secretary was authorized to hold the line on OPA ceiling prices, and at the same time uphold necessary farm production, through a program of purchases-and-resales-at-a-loss, whereby manufactured dairy products were bought at one price and immediately resold

to the vendor at a lower price without any physical delivery. The vendors were required to pass on the payments to the dairy farmers whom the program was designed to aid.[2] Toward the end of the war, however, Congress restricted and eventually abolished the authority of Commodity to make direct subsidy payments or to engage in "purchase-and-resale-at-a-loss" programs.

After the war ended, price supports for dairy products were once again found to be needed. Extensive congressional debates led to the passage of the Agricultural Act of 1948 (62 Stat. 1247). Under Title I of that statute, price support for the calendar year 1949 could be furnished by "loans, purchases, or other operations," and under Title II, support after January 1, 1950, could be effected by "loans, purchases, payments, and other operations." These statutory provisions authorized the use after January 1, 1950, of two methods of supporting agricultural prices: (1) the "purchase" method, under which excess supplies which will not move into consumption at the support level are removed from the market by government purchases; and (2) the "payment" or "subsidy" method, under which the prices of agricultural commodities are allowed to reach their free competitive level, and prices to producers are supported by payments (either direct or through manufacturers and dealers) based on the differential

[2] Price supports through direct purchases of whole milk and butterfat cannot be used because of the perishable nature of those commodities.

between the average market prices and prices at the desired support levels (App. 848).

The 1948 statute was not allowed to remain in effect. Strong opposition to the payment method of support developed, notwithstanding the fact that it was strenuously advocated by then Secretary of Agriculture Brannan. This opposition resulted in the passage of the Agricultural Act of 1949 (Appendix, *infra*, pp. 15-16). The omission of the payment method from this statute resulted from congressional insistence that supports be limited to government loans or purchases in the market (App. 847-851). Thus, although the Secretary was given a broad discretion as to the details of price support programs (7 U.S.C. 1421(b), 1429), the 1949 Act, which is the Act involved here, specifically limited and prescribed the permissible methods and levels of such supports. The statute provides that prices of dairy products shall be supported at such levels between 90% and 75% of parity "as the Secretary determines necessary in order to assure an adequate supply" and that "Such price support shall be provided through *loans* on, or *purchases* of, the products of milk and butterfat" (7 U.S.C. 1446(c), emphasis added).

The normal program, which has been uniformly followed since 1949 except for the special plan here involved, may be summarized as follows (App. 990-991, 1008-1009): The Secretary determines the parity level believed necessary to assure an adequate supply, translates the parity level into dollars-and-cents support prices for milk and butterfat, deter-

mines and announces the government purchase prices for the products of these commodities (computed on the basis of the support prices for the raw materials plus manufacturing costs), and stands ready to buy throughout the marketing year all products offered to Commodity at the support level which the commercial market cannot absorb. The goods would be delivered to Commodity shortly after its acceptance of the offer to sell. The offerer, however, might not be paid for several weeks to permit checking, auditing, and clearance of the transaction.

2. The Transactions Involved

For the marketing year ending March 31, 1954,[3] manufactured dairy products were supported by government purchases at the maximum level of 90% of parity. For example, cheese was purchased at 37¢ per pound and offered for sale at 39¢ (App. 856). Huge surpluses in government warehouses resulted and, because of this fact, Secretary of Agriculture Benson concluded that an adequate supply would be assured for the coming year with support at the minimum level of 75% of parity. Accordingly, he announced such a reduction in February 1954. As a result, cheese would be purchased at 32¼¢ per pound instead of the previous 37¢ (App. 856-857). This announcement resulted in a reduction of inventories by manufacturers and handlers, with in-

[3] The marketing year for milk and butterfat is April 1-March 31 (App. 1022).

creasingly large amounts being sold to Commodity to guard against inventory losses. A substantial amount of production was converted to large size cheddars, which were the only styles acceptable for government storage. The prices of milk and butterfat paid to dairy farmers, which had begun to fall in December and January, continued to decline through the remainder of the marketing year (App. 993).

The Department of Agriculture, fearing that the price of milk would continue to fall to undesirable levels, also feared that certain concerns would sell to Commodity such large parts of their regular inventories that a disruption of normal market conditions would occur, even though this might injure the good will of those concerns.

Faced with these unusual circumstances, the Department modified its normal program in several ways. Although Commodity usually did not announce the price at which it would *sell* products to the market until the beginning of each month, Secretary Benson announced on March 4 that the April sales price would be 2¢ above the announced 1954-55 purchase price for cheese, and 3¢ for butter, so that after April 1 cheese could be purchased from Commodity at 34¼¢ per pound (App. 994). This decision was supplemented by the issuance of Announcement Da-112, providing (as amended) for three major changes:

(a) To permit offers to sell to Commodity to be made during the closing weeks of March prior to inspection and grading (App. 1008). Since cheese

cannot be graded until at least ten days after production, cheese made during the last ten days of March normally is valued on the basis of the support level of the next marketing year.[4] Relaxation of the normal requirement that cheese be inspected before offer was designed to enable manufacturers to take advantage of the higher March support price of 37¢ per pound, and thereby continue to pay higher prices to dairy farmers during those weeks.

(b) To include "small sizes" of cheese in the price-support program for the first time. The declared purpose of the change was to afford manufacturers of such products the same inventory protection as Da-112 afforded to other manufacturers (App. 1010-1011).

(c) To establish, for the March 9—March 31 period, the program which is in issue in these cases (App. 662-671). Under Da-112, manufacturers were permitted, during the remainder of March, to submit combination offers to "sell" to CCC at the 1953-54 purchase prices (*e.g.*, 37¢ per pound for cheese) and "rebuy" the identical goods at the lower 1954-55 sales prices (*e.g.*, 34¼¢ for cheese) which would go into effect on April 1. All such offers had to be accepted before March 31. The time of "delivery" and "transfer of title" to Commodity was to be the date of Commodity's acceptance of the offer if the goods had been inspected before the offer, or the date of inspection (which could be at any time up until April 30), whichever was later. The "resale"

[4] See note 3, *supra*.

to the vendor was to take place on April 1 or on the date of "delivery" to Commodity, whichever was later. Therefore, as to that cheese which was inspected after April 1 (over 50% of the total, App. 1009), "purchase" and "resale" took place at the identical instant of inspection. As to all of the products, the risk of loss was at all times on the offerer. No physical delivery was made, and storage and handling charges were for the offerer's account. If the purchase and selling prices announced to go into effect on April 1 had been increased as a result of bills then pending in Congress, the offerer could cancel the entire contract or be relieved of his obligation to rebuy. The offerer was free to sell the goods to another buyer even after its alleged "sale" to Commodity without incurring any penalty other than the voiding of its contract with Commodity (App. 1009). Commodity, on the other hand, did not have the right to dispose of the goods as it saw fit, but was committed to "resell" them to the offerer. Commodity did not pay for the products it "purchased," nor did the offerers pay for the products they "rebought;" the transaction being settled by one check from Commodity for the difference between the "sale" and the "repurchase" prices (for example, 2¾¢ a pound in the case of cheese).

3. *The Proceedings Below*

In response to a congressional inquiry, the Comptroller General in 1955 ruled that Announcement Da-112 was beyond the authority of the Secretary of Agriculture on the ground that the transactions

were not "purchases" within the meaning of the Agricultural Act of 1949. He therefore determined that payments made to manufacturers and handlers pursuant to the program were improper (App. 856-861). Accordingly, after demands for restitution proved unavailing, suits were instituted by the United States in the spring of 1956 to recover these payments. Petitioners then filed this action, seeking a declaratory judgment as to the validity of the transactions in question.[5]

The district court, agreeing with the Comptroller General's ruling, entered judgments against petitioners in the total amount of $1,062,092.27 plus interest thereon from the date repayment was demanded (App. 1045). The court held that the Da-1?2 transactions were not "purchases" within the meaning of the Act (nor within the meaning of that term as it is normally used in commercial practice) and hence were not authorized (App. 1044-1045).

The court of appeals unanimously affirmed the judgment of the district court insofar as it held that the transactions involved were unauthorized (Pet. 28-47).[6] The court cited with approval the holding

---

[5] *United States* v. *Kraft Foods Co.* was originally filed in the district court for the Eastern District of Pennsylvania, but has since been dismissed upon the stipulation that it will be controlled by the instant action (Pet. 8). *United States* v. *H. J. Heinz Co.* was also brought in the district court for the Eastern District of Pennsylvania, but it was transferred to the Western District of Wisconsin and consolidated with this case pursuant to 28 U.S.C. 1404(a) (App. 985).

[6] However, the court reversed the allowance to the Government of pre-judgment interest.

in *Swift & Co.* v. *United States*, 257 F. 2d 787 (C.A. 4), certiorari denied, 358 U.S. 837, that Da-112 transactions did not constitute "purchases" in any normal sense of the word (Pet. 41-44). Accordingly, the court concluded that, since the payments to petitioners were not authorized by the Act, Commodity was entitled to recover them (Pet. 44).

ARGUMENT

1. The question decided by the court below—*i.e.*, that the transactions involved here were not "purchases" within the meaning of that term as used in the Agricultural Act of 1949 (Pet. 14)—does not warrant review by this Court. The issue is not one of general importance nor is there a conflict of decisions with respect to it. To the contrary, all of the decisions on this question, both in the courts of appeals and in the district courts,[7] are in unanimous accord. Moreover, in another case involving the identical Announcement Da-112 program, this Court has already denied certiorari. See *Swift & Co.* v. *United States*, 257 F. 2d 787 (C.A. 4), certiorari denied, 358 U.S. 837, rehearing denied, 358 U.S. 901.

Announcement Da-112 instituted a novel program, lasting less than 45 days, that differed from the nor-

[7] Petitioners' contention (Pet. 12) that the court below "did not afford petitioners . . . independent review", but "attributed unwarranted significance" to the denial of certiorari in *Swift*, can hardly be squared with the careful and elaborate consideration by the court below, in a 18-page opinion (Pet. 28-45), of each of petitioners' various contentions and suggestions.

mal program which had been universally followed under the 1949 Act, and which has never been departed from before or since the Da-112 plan. It was a response to a set of economic circumstances that had never arisen before and, contrary to petitioners' assertions, one which is not likely to recur.

2. The decision of the court below is plainly correct and is in accord not only with the Comptroller General's decision, but also with the decisions of the two other courts of appeals which have considered the question. See *Swift & Co.* v. *United States*, *supra;* and *Land O'Lakes Creameries, Inc.* v. *Commodity Credit Corp.*, 265 F. 2d 163 (C.A. 8). Both *Swift* and *Land O'Lakes* were virtually identical to the instant action. There is no merit to petitioners' attempted technical distinction between *Swift* and the present case.[8]

Although the Da-112 transactions, found to be invalid by the court below, were clothed in terms of

---

[8] Petitioners contend (Pet. 14) that *Swift* is inapposite here for the sole reason that the defendants in that case emphasized that the transacions involved complied with the economic incidents of a purchase, while in the instant action petitioners rely upon the legal definition of the term. However, in its opinion in *Swift* (257 F. 2d at 794), the Court of Appeals for the Fourth Circuit carefully examined the Da-112 transactions and concluded that "the so-called sales of cheese and butter by the processors were not purchases by [Commodity] in any normal sense of the word." Moreover, the briefs filed in *Swift* were by no means limited to purely economic considerations, but were also directed towards the legal construction of the term "purchases" as it was used in the Act. *E.g.*, the Government's brief in the Fourth Circuit, No. 7579, at pp. 15-21, *Swift & Co.* v. *United States*, *supra*.

"purchase" and "sale", it is apparent that they were paper transactions amounting to nothing more than payments to offset inventory. No physical delivery was made or intended. Storage and handling charges were all "for the account of the offerer." Although risk of loss normally accompanies transfer of title, in Da-112 transactions the risk of loss was retained by the manufacturers and handlers. The Government did not have the right to sell the products to other parties but was obligated to "resell" them at a loss to the vendors. On the other hand, the processors not only retained physical possession of the goods as part of their inventories but also full power to dispose of them in any manner they wished without incurring any liability to the Government. If the support level actually put into effect on April 1 were higher than that announced on March 4, the processors could cancel their entire obligations. The Commodity Credit Corporation did not pay for the products which the processors purported to buy back, both transactions being settled by a single government check for the loss which Commodity agreed in advance to assume.

Furthermore, there can be no doubt that, under the normal program, the cheese covered by Da-112 transactions would not have been sold outright to CCC with the idea of buying it back after April 1. Much of it was worth more than 37¢ per pound because of its age or moisture content, and there was no guarantee under the normal program that the identical cheese could be repurchased. In addition, the substantial charges for repackaging required

under the normal program (but not under Da-112) would have prevented many sales. And, finally, since market prices of cheese after April 1 would be approximately 32¼¢ a pound, manufacturers and handlers presumably could get all of the cheese they needed, other than seasoned cheese, by purchases from the commercial market at that price without having to pay the higher 34¼ price to Commodity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MORTON HOLLANDER,
DOUGLAS A. KAHN,
Attorneys.

AUGUST 1959

APPENDIX

The Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, provides in pertinent part:

7 U. S. C. 1421.

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

* * * * *

7 U. S. C. 1426.

The Secretary shall, insofar as practicable, announce the level of price support * * * in advance of the beginning of the marketing year * * * but the level of price support so announced shall not exceed the estimated maximum level of price support specified in this Act, based upon the latest information and statistics available to the Secretary when such level of price support is announced; and the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

* * * * *

7 U. S. C. 1429.

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*,

That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act;

* * * *

7 U. S. C. 1446.

The Secretary is authorized and directed to make available ** * * price support to producers for * * * milk, butterfat, and the products of milk and butterfat as follows:

* * * *

(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat.

7 U. S. C. 1447.

The Secretary is authorized to make available through loans, purchases, or other operations price support to producers for any nonbasic agricultural commodity not designated in section 1446 of this title at a level not in excess of 90 per centum of the parity price for the commodity.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 518187 224